No. 80-1414

Office-Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In re INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; and UNIVERSAL MARITIME SERVICE CORP.,

Petitioners.

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT; COLLINS J. SEITZ, CHIEF JUDGE, and JOHN J. GIBBONS and JOSEPH F. WEIS, JR., CIRCUIT JUDGES

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
Attorneys for Petitioner International Longshoremen's Association, AFL-CIO
One State Street Plaza
New York, New York 10004
(212) 425-3240

CONSTANTINE P. LAMBOS
DONATO CARUSO
LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Petitioners New York Shipping Association, Inc.; International Terminal Operating Co., Inc.; John W. McGrath Corp.; Pittston Stevedoring Corp.; and Universal Maritime Service Corp.
25 Broadway
New York, New York 10004
(212) 943-2470

Questions Presented

1. Does a stay of a judicial action to await a prospective non-jury administrative adjudication, which will later be accorded offensive collateral estoppel effect, deprive defendants of their constitutional right to a trial by jury?

2. Does the Third Circuit's order imposing a stay and directing that an as yet unrendered decision of the NLRB be given collateral estoppel effect contravene the earlier mandate of this Court and exceed the appellate jurisdiction of the court of appeals since it amounts to a *sua sponte* adjudication of new issues beyond the scope of the interlocutory appeal under consideration?

3. Did the Third Circuit contravene the mandate of this Court by failing to revise its earlier decision in this case, in light of this Court's decision in *NLRB* v. *International Longshoremen's Ass'n,* 100 S. Ct. 2305 (1980), to remove from the non-statutory labor exemption from the treble damage provisions of the antitrust laws the requirement that the challenged collectively bargained work preservation clause constitute the least competitively restrictive alternative that could have been negotiated?

Parties

In addition to petitioners,[1] the parties include Sea-Land Service, Inc., Seatrain Lines, Inc., and United Terminal Corp., who were defendants-appellees below, and Consolidated Express, Inc. and Twin Express, Inc., who were plaintiffs-appellants below.

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[1] A complete list of the corporate petitioners, their parent corporations and their subsidiaries is contained in Appendix C (App. C at 17a).

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No. 80-1414

IN THE

Supreme Court of the United States

October Term, 1980

In re INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN W. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; and UNIVERSAL MARITIME SERVICE CORP.,

Petitioners.

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

Introduction

Petitioners respectfully pray that writs of mandamus and prohibition issue directing the Honorable, the United States Court of Appeals for the Third Circuit, and the Honorable Collins J. Seitz, Chief Judge, and John J. Gibbons and Joseph F. Weis, Jr., Circuit Judges, to

(1) vacate the judgment entered on February 13, 1981 which ordered the district court to stay this case pending final adjudication of related unfair labor practice proceedings now before the NLRB and directed that the NLRB's prospective adjudication be accorded collateral estoppel effect;

(2) abstain from staying this case pending final adjudication of the related NLRB proceedings; and,

(3) revise their earlier 1979 decision in this case, which is reported at 602 F.2d 494, to conform to the decision of this Court in *NLRB* v. *International Longshoremen's Ass'n*, 100 S. Ct. 2305 (1980).

Opinions Below

The opinion of the court of appeals, not yet reported, is reproduced as Appendix A to this petition (App. A at 1a). Earlier opinions in this case are reported at 452 F. Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part,* 602 F.2d 494 (3d Cir. 1979), *vacated and remanded,* 100 S. Ct. 3040 (1980).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit, which was entered on February 13, 1981, is reproduced as Appendix B (App. B at 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

Statement of the Case

This case involves the Rules on Containers, the collectively bargained response to the technological displacement of longshore work occasioned by the increasing use of automated cargo handling techniques in the maritime industry. This exceptional case, which has previously been before this Court, presents substantial questions of law arising at the interface where federal labor and antitrust regimes overlap.

This case was spawned by an NLRB determination in 1975 that the Rules on Containers violate § 8(e) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(e), and that the enforcement of these labor provisions contravenes LMRA § 8(b)(4), 29 U.S.C. § 158(b)(4). *International Longshoremen's Ass'n (Consolidated Express, Inc.)* ("*Conex*"), 221 N.L.R.B. 956 (1975), *enforced,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977). Shortly after the Second Circuit's affirmance of the NLRB's determination in *Conex,* Consolidated Express, Inc. and

Twin Express, Inc. instituted the present action contending that implementation of the Rules on Containers entitled them to relief under LMRA § 303, 29 U.S.C. § 187, as well as treble antitrust damages under § 4 of the Clayton Act, 15 U.S.C. § 15.

Consolidated and Twin sought summary judgment contending that (1) the NLRB's prior finding of an LMRA violation was entitled to offensive collateral estoppel effect automatically imposing LMRA § 303 liability and removing from the Rules on Containers the protective shield of the non-statutory labor exemption, and (2) the enforcement of these collective bargaining provisions constituted a group boycott *per se* unlawful under §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1 and 3.

Although the district court applied collateral estoppel, it nevertheless denied summary judgment. The Third Circuit affirmed the denial of summary judgment with respect to the antitrust claims, but reversed on the LMRA § 303 count. However, it formulated an unprecedented non-statutory labor exemption from the treble damage sanctions of § 4 of the Clayton Act, which required *inter alia* that the challenged contract be the least competitively restrictive alternative that could have been negotiated. 602 F.2d at 521. Petitions for certiorari were then filed. Nos. 78-1902, 78-1905 and 79-221.

On June 20, 1980, this Court in a related labor law case overturned the NLRB's invalidation of the Rules on Containers under LMRA §§ 8(b)(4) and 8(e), and remanded to the NLRB for appropriate reconsideration. *NLRB* v. *International Longshoremen's Ass'n* ("*ILA*"), 100 S. Ct. 2305 (1980).[1] Shortly thereafter, this Court granted cer-

[1] In view of the *ILA* determination, the Second Circuit vacated and recalled its earlier mandate in *Conex* and remanded that case to the NLRB.

tiorari in this case, vacated the Third Circuit's earlier decision and remanded for reconsideration in light of the *ILA* decision. 100 S. Ct. 3040 (1980).

The Decision of the Court of Appeals

On February 13, 1981, the Third Circuit concluded that *ILA* had virtually no effect upon its earlier decision in this case except to remove the basis for invocation of offensive collateral estoppel. To preserve even this latter aspect of its earlier decision, the Third Circuit, although the question of a stay had never been previously raised in this case and had not been addressed by the district court, entered a judgment on remand staying the final hearing in this case until a final determination of the unfair labor practice charges pending before the NLRB in *Conex*.

The judgment of the court of appeals also directs the district court that, if the NLRB ultimately invalidates the Rules on Containers under federal labor law, it should invoke collateral estoppel to impose § 303 liability and adjudicate the labor exemption issue in accordance with the Third Circuit's earlier decision.[2] The Third Circuit's test for the non-statutory labor exemption remains intact despite this Court's decision in *ILA*.

Reasons for Granting the Writs

1. *The Court of Appeals Has Deprived Petitioners of the Right to Trial by Jury.*

A defendant is entitled to a trial by jury in a § 303 action. *United Brick Workers* v. *Deena Artware, Inc.*, 198 F.2d 637

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[2] Paradoxically, the Third Circuit did not issue corresponding directions to impose defensive collateral estoppel if the NLRB should ultimately find no unfair labor practice, despite the court's own prior recognition that the preclusionary collateral estoppel doctrine applies equally to charging parties before the Board. 602 F.2d at 503.

(6th Cir.), *cert. denied*, 344 U.S. 897 (1952); *Douglas* v. *IBEW Local 498*, 136 F. Supp. 68, 75 (W.D. Mich. 1955); *cf., Curtis* v. *Loether*, 415 U.S. 189 (1974); *Minnis* v. *International Union, United Automobile Workers*, 531 F.2d 850 (8th Cir. 1975).[3] This constitutional right is also guaranteed in private antitrust cases. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

The Third Circuit's stay in this case concededly deprives petitioners of their jury trial right. (App. A at 13a).[4] The Court of Appeals cavalierly rationalized this result by simply concluding that in view of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), "it is nothing of which defendants can complain." (App. A at 13a).[5] *Parklane*, how-

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[3] LMRA § 303 invests jurisdiction in the federal courts to adjudicate violations of LMRA § 8(b)(4). A § 303 suit is not dependent upon any prior NLRB finding of an 8(b)(4) violation. *Int'l Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952); *Vaca* v. *Sipes*, 386 U.S. 171, 180 (1967). The NLRB's concurrent jurisdiction does not diminish the court's separate and independent plenary jurisdiction. *See Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). Although a prior NLRB determination may be accorded collateral estoppel effect in a § 303 litigation, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the two tribunals may proceed contemporaneously, *Painters District Council* v. *Edgewood Contracting Co.*, 416 F.2d 1081, 1085 (5th Cir. 1969), even to the rendering of inconsistent determinations. *Compare NLRB* v. *Deena Artware, Inc.*, 198 F.2d 645 (6th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953) *with United Brick Workers* v. *Deena Artware, Inc.*, 198 F.2d 637 (6th Cir.), *cert. denied*, 344 U.S. 897 (1952).

[4] At the oral argument before the Third Circuit, counsel for respondents Consolidated and Twin candidly admitted his clients' preference to have the unfair labor practice issues decided by the NLRB rather than by the District Judge assigned to this case.

[5] The principal motivation for the Third Circuit's unprecedented stay in this case was the desire to avoid potential disparate results (App. A at 11a-12a). Its analogy (App. A at 12a) to the restrictive

ever, stands for the limited holding that the collateral estoppel effect of an *existing* non-jury determination does not violate the Seventh Amendment.

Nothing in *Parklane* supports the Third Circuit's expansive postulate that a court may prospectively bar a jury trial by deliberately manipulating the litigation in favor of a non-jury adjudication. Indeed, the *Parklane* Court expressly reaffirmed the principle that judicial discretion in establishing the priority for litigating legal jury claims and equitable non-jury claims "'must, wherever possible, be exercised to preserve jury trial.'" 439 U.S. at 334, *quoting Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 510 (1959). The diversion of a case from a tribunal where a jury trial is available to a non-jury forum has been consistently declared a violation of the Seventh Amendment. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962) (trial of equity claims before legal claims); *Beacon Theatres* (trial of declaratory judgment count prior to antitrust count); *In re Skinner & Eddy Corp.*, 265 U.S. 86 (1924) (reinstitution of a Court of Claims proceeding to defeat state jury action); *In re Peterson*, 253 U.S. 300 (1920) (appointment of referee); *In re Simons*, 247 U.S. 230 (1918) (transfer to equity side of the court).

The Third Circuit's stay, which is intentionally designed to enable this case to be decided in a non-jury forum, di-

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(Footnote 5 continued)
standard it has imposed upon district courts in preliminary injunction proceedings under LMRA § 10(1), 29 U.S.C. § 160(1), has no relevant bearing in this case. It should be noted that the Third Circuit's § 10(1) standard is of questionable validity since it has been expressly rejected by both the Second and Fourth Circuits. *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Wkrs.*, 494 F.2d 1230 (2d Cir. 1974); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977). In any event, the constitutional right to a jury trial should not be sacrificed to the hobgoblin of consistency.

rectly violates this venerable rule of law and divests petitioners of their constitutional right to a trial by jury.[6]

If the Third Circuit's judgment is left undisturbed, the deprivation of petitioners' constitutional rights will be a consummated *fait accompli* irremediable on final review. Under these extraordinary circumstances, the peremptory writs of mandamus and prohibition provide the only appropriate remedy. *Beacon Theaters; Skinner & Eddy Corp.; Simons; Peterson.*

2. *The Court of Appeals Has Exceeded Its Jurisdiction on Remand From This Court.*

Courts of appeal possess limited appellate jurisdiction. *Whitney* v. *Dick*, 202 U.S. 132 (1906). When they entertain a case remanded from this Court, they cannot "give any other or further relief . . . or intermeddle with it further than to settle so much as has been remanded." *In re C. A. Potts & Co.*, 166 U.S. 263, 265 (1897).

The present appellate posture of this case is confined to consideration of an interlocutory appeal under 28 U.S.C. § 1292(b) from the district court's denial of summary judgment. When this Court vacated the Third Circuit's earlier 1979 decision and remanded the case for reconsideration in

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[6] The denial of a jury trial is not authorized by the Third Circuit's earlier decision in *International Ass'n of Heat and Frost Insulators* v. *United Contractors, Inc.*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974). That antitrust case, which did not include a LMRA § 303 count, was tried without a jury by consent. The subsidiary labor law issue which the district court, with the Third Circuit's approval, referred to the NLRB involved a union's status as a bargaining agent—a question falling within the NLRB's exclusive jurisdiction and for which no private right of action existed. The Third Circuit cited no authority for deferring to an administrative agency under the doctrine of primary jurisdiction where Congress has expressly empowered the courts to try the identical issue. The action taken in this case is without precedent.

light of *ILA*, it did not expand the Third Circuit's limited jurisdiction to decide only those issues falling within the scope of the interlocutory appeal.[7] The issues of the propriety of a stay or of the grant of collateral estoppel to a prospective NLRB adjudication were never previously presented for adjudication in this case to either the district court or the court of appeals. These issues then do not fall within the scope of the present interlocutory appeal.

The Third Circuit's February 13, 1981 judgment orchestrating the future course of this case exceeds the bounds of its appellate jurisdiction and of the scope of the previous remand from this Court, 100 S. Ct. 3040. The Third Circuit has assumed the role of a *nisi prius* court. It has usurped the exclusive discretion of the district court (a) to control its own docket through stays,[8] *American Life Insurance Co.* v. *Stewart*, 300 U.S. 203, 215 (1937), and (b) to decide the extent to which a future NLRB determination may be accorded collateral estoppel effect. *Parklane*, *supra*, 439 U.S. at 331. *See also Mooney* v. *Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980). The district court's exercise of discretion is reviewable only for abuse. *United States* v. *Corrick*, 298 U.S. 435 (1936). The Third Circuit's *sua sponte* direction to the district court to exercise its discretion in the future with respect to an NLRB adjudication not yet

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[7] Although the Third Circuit has taken the position that it is not limited in a § 1292(b) interlocutory appeal to the precise questions certified for review, *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 885 (1974), it has nonetheless expressly disclaimed the authority to "exercise appellate jurisdiction over an issue not yet decided in the district court." *Id.* at 764. Indeed, in defining the scope of its review in this case, the Third Circuit confined its appellate role to an adjudication of "all issues 'properly put in dispute' bearing upon whether entry of judgment was appropriate." 602 F.2d at 502.

[8] In *Frost Insulators, supra*, cited by the court of appeals as the only precedent for its order (App. A at 11a), it was the district court which had originally decided to impose the stay.

rendered constituted an improper, premature advisory opinion. *FCC* v. *Pacific Foundation,* 438 U.S. 726, 735 (1978); *Cummings* v. *Redereriaktieb Transatlantic,* 242 F.2d 275, 276 (3d Cir. 1957).

When a court of appeals exceeds its scope of review on remand from this Court and fails to limit itself to the issues encompassed by the remand, mandamus is appropriate to correct the error. *Ex parte Peru,* 318 U.S. 578 (1943); *Potts, supra; Gaines* v. *Rugg,* 148 U.S. 228 (1893). To permit the February 13, 1981 judgment in this case to survive until final review will be patently ineffective to correct the Third Circuit's error. Mandamus is the only appropriate remedy. *McClellan* v. *Carland,* 217 U.S. 267 (1910); *Livingston* v. *Dorgenois,* 11 U.S. (7 Cranch) 577 (1813).

3. *The Third Circuit Has Failed to Adhere to This Court's* ILA *Decision.*

The court of appeals failed to detect the glaring discrepancy between this Court's opinion in *ILA* and the circuit's prior formulation of a test for the non-statutory labor exemption from treble damage antitrust sanctions. In *ILA,* this Court expressly admonished that

> Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs. 100 S. Ct. at 2317.

In its earlier 1979 decision, which it has readopted in the judgment challenged in this petition, the Third Circuit imposed upon collective bargaining parties the unduly harsh prerequisite for the labor exemption of establishing that the challenged labor contract "went no further in imposing

restraints in the secondary market than was reasonably necessary to accomplish" "the object of collective bargaining thought at the time to be legitimate." 602 F.2d at 521. The Third Circuit's least competitively restrictive alternative test irreconcilably conflicts with Justice Marshall's rejection of that harsh standard in *ILA*.

The fundamental issue in this case relates to the proper accommodation of the often competing policies underlying the labor and antitrust statutes. *Local 189 Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *cf. Volkswagenwerk, A.G.* v. *FMC*, 390 U.S. 261, 284 (1968) (Harlan, J. concurring). The development of conflicting standards is hardly conducive to a proper harmonizing of these statutory schemes. Indeed, if the Rules are held to be a lawful work preservation device under Justice Marshall's formulation, the non-statutory exemption should apply to protect the Rules from antitrust challenge. *Granddad Bread, Inc.* v. *Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979) *cert. denied*, No. 79-1841 (U.S. Jan. 12, 1981); *Suburban Beverages, Inc.* v. *Pabst Brewing Co.*, 462 F. Supp. 1301 (E.D. Wis. 1978). Consequently, the test formulated by Justice Marshall in *ILA*—albeit in a labor law context—should also prevail in this antitrust case. The Third Circuit's refusal to adhere to Justice Marshall's test directly contravenes this Court's mandated reconsideration in light of *ILA*. 100 S. Ct. 3040.

When a court of appeals has failed to comply with the terms of a remand from this Court, mandamus will lie both to correct the error and to clarify the meaning of this Court's decision. *Baltimore and Ohio R. Co.* v. *United States*, 279 U.S. 782 (1929); *Potts*, *supra*; *Gaines*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for writs of mandamus and prohibition should be granted.

Dated: New York, New York
February 20, 1981

Respectfully submitted,

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
Attorneys for Petitioner
International Longshoremen's
Association, AFL-CIO
One State Street Plaza
New York, New York 10004
(212) 425-3240

CONSTANTINE P. LAMBOS
DONATO CARUSO
LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Petitioners
New York Shipping Association, Inc.;
International Terminal Operating
Co., Inc.; John W. McGrath Corp.;
Pittston Stevedoring Corp.; and
Universal Maritime Service Corp.
25 Broadway
New York, New York 10004
(212) 943-2470

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1529

No. 78-1530

CONSOLIDATED EXPRESS, INC.,

Appellant,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Appellees,

and

TWIN EXPRESS, INC.,

Appellant,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.,

Appellees.

Appendix A—Opinion of the Court

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Argued: January 20, 1981

Before:

SEITZ, *Chief Judge* and
GIBBONS and WEIS, *Circuit Judges.*

(Opinion Filed: February 13, 1981)

JOHN A. RIDLEY, Esq.
CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, New Jersey 07102

RICHARD A. WHITING, Esq.
(Argued)
ELLEN M. MCNAMARA, Esq.
CLIFFORD G. HOLDERNESS, Esq.
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C.

*Attorneys for Consolidated Express, Inc.
and Twin Express, Inc.*

JEFFREY REINER, Esq.
MEYNER, LANDIS & VERDON
Suite 2500
Gateway One
Newark, New Jersey 07102

JAMES W. B. BENKARD, Esq.
(Argued)
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

Attorneys for Sea-Land Service, Inc.

THOMAS W. GLEASON, Esq.
One State Street Plaza
New York, New York 10004

Of Counsel:

ERNEST L. MATHEWS, JR., Esq.
(Argued)

Attorneys for International Longshoremen's Association, AFL-CIO

MICHAEL S. WATERS, Esq.
CARPENTER, BENNETT & MORRISSEY
744 Broad Street
Newark, New Jersey 07102

C. P. LAMBOS, Esq.
DONATO CARUSO, Esq. (Argued)
LORENZ, FINN, GIARDINO &
LAMBOS
25 Broadway
New York, New York 10004

Attorneys for New York Shipping Association, Inc., International Terminal Operating Co., Inc., John W. McGrath Corp., Pittston Stevedoring Corp. and Universal Maritime Service Corp.

Opinion of Court of Appeals

GIBBONS, *Circuit Judge:*

We deal here with the proper course to be followed in complying with the mandate of the Supreme Court vacating our prior judgment and remanding an appeal to us for further consideration in light of *NLRB* v. *International Longshoremen's Ass'n,* 48 U.S.L.W. 4765 (June 20, 1980). Our earlier decision is *Consolidated Express, Inc.* v. *New*

York Shipping Ass'n, 602 F.2d 494 (3d Cir. 1979). It is one of a series of appellate decisions growing out of the adoption in 1969 of a collective bargaining agreement between the International Longshoremen's Association (ILA) and the New York Shipping Association (NYSA), a bargaining representative containing Rules on Containers. The history of enforcement of those Rules against off-pier freight consolidators is set forth in detail both in the Supreme Court's opinion and in our earlier opinion, and need not be repeated here.

The appeal is before us in an interlocutory stage because the trial court, having decided several legal issues reflected in an order denying partial summary judgment, concluded that the order involved controlling questions of law as to which there is a substantial ground for difference of opinion, and included the formal statement required by 28 U.S.C. § 1292(b). This court permitted the appeal, and we considered two counts of complaints filed by Consolidated Express, Inc. (Conex) and Twin Express, Inc. (Twin), common carriers engaged in the business of consolidating less than container load cargo for shipment between Puerto Rico and the Port of New York. The defendants are the ILA, a number of stevedore contractors, and two vessel owners engaged in common carriage by water between Puerto Rico and the Port of New York. Count I of the complaint seeks treble damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, for injury to the business or property of Conex and Twin resulting from enforcement against them of the Rules on Containers, on the theory that those rules constituted a group boycott in violation of sections 1 and 3 of the Sherman Act. Count III charges that the ILA in enforcing the Rules on Containers committed unfair labor practices in violation of

section 8(b)(4)(ii)(B) of the Labor Managament Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B), and seeks damages for injury to their business or property under section 303(b) of that act, 29 U.S.C. § 187(b). We addressed the two counts separately, and dealt separately with a number of legal claims and defenses raised by the parties, only one of which is called into question by the Supreme Court's mandate.

When the case was before the district court and before us, the plaintiffs Conex and Twin had already challenged the legality of the Rules on Containers by filing unfair labor charges with the National Labor Relations Board (NLRB or Board). In a consolidated hearing the Board held that the Rules violated section 8(e) of the act and that the ILA's actions in enforcing them were unfair labor practices. It entered an appropriate cease and desist order, *Consolidated Express, Inc.*, 221 N.L.R.B. No. 144 (1975), and both the NYSA and the ILA petitioned for review to the United States Court of Appeals for the Second Circuit. That court enforced the Board's order. *International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977). A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978. The district court held that the Board's finding that the ILA had committed a section 8(b)(4) violation, made in a proceeding to which both the ILA and the plaintiffs Conex and Twin were parties, collaterally estopped it from litigating its liability for damages on the section 303 count. In Part IV-A of our opinion, 602 F.2d at 503-06, we affirmed that holding. Only the ILA is a defendant in the section 303 count, but it, the shippers and the stevedores

are defendants in the section 4 Clayton Act count. All defendants sought dismissal of that count because the Rules on Containers were collective bargaining arrangements falling within the labor exemption to the antitrust laws. In Part V-A-1 of our opinion, 602 F.2d at 511-12, we held that because all the defendants were parties to the unfair labor practice proceedings before the Board they are equally bound by the Board decision enforced by the judgment of the Court of Appeals for the Second Circuit.

Conex and Twin were not the only freight consolidators affected by the Rules on Containers, and others filed unfair labor practice charges as well. In each case the Board held that enforcement of the Rules was illegal. The Courts of Appeals for the First and Fourth Circuits enforced the Board's orders. *International Longshoremen's Ass'n, Local 1575* v. *NLRB,* 560 F.2d 439 (1st Cir. 1977); *Humphrey* v. *International Longshoremen's Ass'n,* 548 F.2d 494 (4th Cir. 1977). However, in *International Longshoremen's Ass'n* v. *NLRB,* 613 F.2d 890 (D.C. Cir. 1979), decided five months after the decision in this court, a divided panel in the Court of Appeals for the District of Columbia Circuit declined to enforce a Board order, holding that it had failed to demonstrate that the Rules on Containers were unlawful. The Board's petition for certiorari was granted, and in *NLRB* v. *International Longshoremen's Ass'n, supra, aff'g* 613 F.2d 890 (D.C. Cir. 1979), a divided Supreme Court affirmed.

Meanwhile petitions for certiorari had been filed by all parties to this action. On June 30, 1980, ten days after the filing of *NLRB* v. *International Longshoremen's Ass'n, supra,* the Supreme Court granted the petitions for certiorari and without opinion entered the order referred to in the opening paragraph above.

The Supreme Court majority held that in determining that the Rules on Containers violated section 8(e), the Board applied an incorrect legal standard. The correct legal standard according to the majority was twofold: (1) whether the union's objective was the preservation of work traditionally performed by employees represented by the union; and (2) whether the contracting employer has the power to assign the work to the employees in question. *See National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 620, 635 (1967); *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977). The Board's error, according to the majority, was in focusing on the stuffing and stripping work done by teamsters at the places of business of the freight consolidators, rather than on the work formerly done by longshoremen at the docks. 48 U.S.L.W. at 4770. However, the Supreme Court expressly declined to pass upon the legality of the Rules under either aspect of its twofold test.[1] Instead it affirmed the court of

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[1] The opinion of the Court states:

> Respondents assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier. Petitioners-intervenors, on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated.
>
> These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. Since the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue, we will not address them here. We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained. . . .
>
> If the Board finds, on remand, that the Rules have a lawful work preservation objective, it will then, of course, be obliged to consider the charging parties' contention that CONASA

appeals' judgment remanding to the Board for further proceedings.

NLRB v. *International Longshoremen's Ass'n, supra,* presented to the Court none of the issues discussed in our earlier decision other than the possible effect in this case of the Second Circuit decision in *International Longshoremen's Ass'n* v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *reh. denied,* 430 U.S. 911 (1977). Moreover, that case was not before the Court, although the identical legal issue was. We understand the Supreme Court's mandate remanding for reconsideration in light of *NLRB* v. *International Longshoremen's Ass'n, supra,* to be a direction that we reconsider those parts of our decision which directed that the district court give collateral estoppel effect on the existence of an unfair labor practice

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NOTE 1—(Continued)

> [Council of North Atlantic Shipping Associations] members did not have the right to control the stuffing and stripping of containers. Because the Board held that the agreement was directed at work acquisition, rather than work preservation, it did not decide the right to control issue in this case. That issue remains open on remand. Therefore, and because the arguments of the parties were necessarily addressed to an erroneous conception of the work whose control was disputed, any discussion of that issue here would be premature. Petitioners have also argued that the employers, as common carriers who are subject to government regulation and to the provisions of their own tariffs, shippers' bills of lading, and intermodal interchange agreements with motor carriers, have no legal right to withhold containers or container services from their customers on a selective basis, to condition access to the containers on compliance with the Rules, to seek indemnification from their customers for fines imposed under the Rules, or to enforce the Rules after the containers have been released to motor carriers. . . . These contentions present difficult and complex problems which are not properly before us.

48 U.S.L.W. 4770, 4771 (footnotes and citations omitted).

to the Second Circuit judgment. Those are Parts IV-A and Part V-A-1.

Had there been no further proceedings in the Court of Appeals for the Second Circuit, the Supreme Court's remand would have presented us with the troublesome question whether a final judgment should be denied collateral estoppel effect because in litigation between different parties it subsequently is established that the first judgment rests on an erroneous legal premise.[2] We need not reach that question, however, for on the motion of the ILA, the Court of Appeals for the Second Circuit recalled its mandate, vacated its judgment, and remanded to the Board for further proceedings.[3] We are advised that a similar result has been achieved with respect to each of the judgments holding that the Rules on Containers violate section 8(e), and that all those proceedings have been consolidated for hearing before a single administrative law judge on an expedited schedule.[4] Since the judgment which was the predicate for our discussion of collateral estoppel has been vacated, so much of our prior judgment as required giving that judgment any effect in this case must be vacated. In all other respects our earlier decision is unaffected.

The new posture of the case, resulting from the Supreme Court's vacation and remand, requires however, that we consider an appropriate direction to the district court in

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[2] *See* Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); *In re* Federal Water & Gas Corp., 188 F.2d 100, 105 (3d Cir.), *cert. denied sub nom. Chenery Corp.* v. *SEC*, 341 U.S. 953 (1951).

[3] Order dated October 1, 1980 in Docket Nos. 75-4266, 76-4003.

[4] Board order dated January 19, 1981 in Cases 2-CC-1364, 1365; 2-CE-75; 5-CC-791-94; 5-CE-48-51; 12-CC-1002, 1004; 22-CC-541, 554; 22-CE-19, 20; 5-CC-925, 929; 4-CC-1133; 4-CE-55; 12-CE-30.

light of the changed circumstances. When the case was before us previously the labor law issues had been definitively resolved by the administrative agency charged with the responsibility for enforcement of the National Labor Relations Act, and there was extant a section 10(1) injunction against enforcement of the Rules on Containers against Conex and Twin. *Balicer* v. *International Longshoremen's Ass'n,* 364 F. Supp. 205 (D.N.J.), *aff'd mem.,* 491 F.2d 748 (3d Cir. 1973); *Balicer* v. *International Longshoremen's Ass'n,* 86 L.R.R.M. 2559 (D.N.J. 1974). We are advised that steps have now been taken to renew enforcement of the Rules, and that as a result a new section 10(1) action is pending in the district court seeking preservation of the status quo pending Board resolution of the issues for determination of which the Supreme Court remanded.

It appears to us that the present posture of the several unfair labor practice cases pending before the Board is the result which the Supreme Court anticipated when it decided *NLRB* v. *International Longshoremen's Ass'n, supra.* Moreover the Court was quite explicit in its direction on remand that it was the Board which should in the first instance pass upon the legality of the Rules on Containers.[5] Thus the remand in this case must have contemplated that we consider whether, in our direction to the district court, we should require that before it determines the labor law issues it, too, await decision of those issues by the Board. That question has been briefed and argued. The plaintiffs urge that final hearing in the district court should not be held until a decision in the pending consolidated unfair labor practice cases becomes final, while

[5] *See* note 1 *supra.*

the defendants, for various reasons, prefer that trial of the section 303 and section 4 claims go forward.

For several reasons we conclude that final hearing on those claims should not be held until the pending Board charges are finally disposed of. First, there is the problem of obvious duplication of effort. Proof of the section 303 charge will involve, to a large extent, the same evidence which will be presented in the unfair labor practice case. Moreover, even in the antitrust case application of the labor exemption will require development of the same facts. Secondly, although the trial court obviously has subject matter jurisdiction, where resolution of a particular issue has also been vested in an administrative agency having primary responsibility for the resolution of issues arising under a given statutory regulatory scheme, a stay pending agency determination is often appropriate. *See International Ass'n of Heat and Frost Insulators* v. *United Contractors, Inc. of Pittsburgh, Pennsylvania,* 483 F.2d 384, 400 (3d Cir. 1973), *modified,* 494 F.2d 1353 (3d Cir. 1974). This case is one particularly appropriate for initial deference to the agency, for we are dealing with unfair labor practice questions at the interface of two segments of the international transportation industry, involving competing labor unions, and at the interface of labor and antitrust public policies. While the court owes no particular deference to the Board's antitrust views, its own views on the reach of the antitrust laws cannot but be enlightened by the Board's opinion on whether the Rules on Containers are lawful as a matter of labor law. A fortiori this is the case with respect to the section 303 claim. Thirdly, there is the distinct possibility that if both cases go forward simultaneously they may wind up before this court, or before two separate courts of appeals, with conflicting fac-

tual determinations, subject to differing standards of appellate review. The interest of the judicial process in avoiding that possibility is obvious. An analogous situation has confronted us with respect to our review of section 10(1) injunction proceedings and of Board orders. If section 10(1) were construed to vest in the district court authority to reach the merits of the underlying unfair labor practice charge, we would face the prospect of reviewing the district court by the clearly erroneous standard of Fed. R. Civ. P. 52(a), while, possibly simultaneously, reviewing a contrary Board decision by the substantial evidence standard of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). To avoid that result we have interpreted section 10(1) as ancillary to the main unfair labor practice proceeding, and have confined the district court in a section 10(1) to determining that the General Counsel has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory on which he proceeds is substantial and not frivolous. *E.g.*, *Hirsch* v. *Building & Construction Trades Council of Philadelphia & Vicinity*, 530 F.2d 298 (3d Cir. 1976); *Samoff* v. *Building & Construction Trades Council of Philadelphia & Vicinity*, 475 F.2d 203 (3d Cir.), *vacated for mootness*, 414 U.S. 808 (1973); *Schauffler* v. *Local 1291, International Longshoremen's Ass'n*, 292 F.2d 182 (3d Cir. 1961). The review problem could be even more complex in this case, because of our even narrower scope of review of jury verdicts when compared with our review of injunctions or Board orders. Finally, we cannot close our eyes to the reality that although one count of the complaints before us on this appeal charges violations of the antitrust laws, in a very real sense the labor law questions are primary, while the antitrust law questions are, if not secondary, at least dependent.

The defendants object that if the final hearing in this case is delayed while the Board proceeding goes forward they may, if the Board's decision is adverse, be deprived of trial by jury on some issues by virtue of collateral estoppel. That is true, but it is nothing of which defendants can complain. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 333-337 (1979). The judicial process will benefit significantly from the result of avoiding retrial of issues already decided. On the other hand, if the final hearing in this case is not stayed pending resolution of the Board proceeding, it is doubtful that a verdict in favor of the defendants would preclude the General Counsel from litigating the same issues before the Board because the General Counsel represents public interests in a Board proceeding.

On balance, therefore, we conclude that the sounder course is to direct that final hearing on Counts I and III be stayed until the unfair labor practices presently pending before the Board have been finally determined. Such a final determination includes any proceedings seeking judicial review of the Board's action. We do not suggest that in the meantime the case must stand still. Whether discovery should go forward, and whether dispositive motions directed to issues not affected by the alleged unfair labor practice should be entertained are questions we leave to the district court's discretion.

The judgment of this court having been vacated by the Supreme Court, on reconsideration the order appealed from, denying the motions of Conex and Twin for summary judgment on Count I and Count III will be affirmed, and the case remanded to the district court for the entry of an order staying final hearing on those counts until a final determination of the unfair labor practice charges pending before the Board. If in those proceedings it should

be held that the Rules on Containers violate section 8(e) of the act and the ILA's actions in enforcing them are unfair labor practices under section 8(b)(4)(ii)(B), the court should proceed in accordance with our prior opinion. If the Board should decide that the Rules on Containers do not violate section 8(e) and their enforcement by the ILA was not an unfair labor practice, the court should proceed appropriately disregarding Part IV-A and Part V-A-1 thereof. Each party will bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-1529

CONSOLIDATED EXPRESS, INC.,

Appellant,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICES, INC.; SEATRAIN LINES INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D. C. Civil No. 76-1645)

No. 78-1530

TWIN EXPRESS, INC.,

Appellant,

vs.

NEW YORK SHIPPING ASSOCIATION, INC.; SEA-LAND SERVICE, INC.; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL TERMINAL OPERATING CO., INC.; JOHN M. MCGRATH CORP.; PITTSTON STEVEDORING CORP.; UNITED TERMINALS CORP.; UNIVERSAL MARITIME SERVICES CORP.

(D. C. Civil No. 77-156)

(District of New Jersey—Newark)

Appendix B—Judgment of Court of Appeals

Present:

SEITZ, *Chief Judge* and
GIBBONS and WEIS, *Circuit Judges.*

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

After remand from the Supreme Court of the United States this cause was argued by counsel on January 20, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed December 19, 1977, as amended by the order of the said District Court filed February 23, 1978, to the extent that the order denied the motions of Conex and Twin for summary judgment on Count I and Count III be, and the same is hereby affirmed, and the cause is remanded to the district court for the entry of an order staying final hearing on those counts until a final determination of the unfair labor practice charges pending before the Board. If in those proceedings it should be held that the Rules on Containers violate section 8(e) of the act and the ILA's actions in enforcing them are unfair labor practices under section 8(b)(4)(ii)(B), the court should proceed in accordance with our prior opinion. If the Board should decide that the Rules on Containers do not violate section 8(e) and their enforcement by the ILA was not an unfair labor practice, the court should proceed appropriately disregarding Part IV-A and Part V-A-1 thereof. Each party shall bear its own costs.

ATTEST:

SALLY *Illegible*
Clerk

February 13, 1981

APPENDIX C

Petitioners' Parent Corporations and Subsidiaries

International Terminal Operating Co., Inc. ("ITO")

Parent corporation: Ogden American Corp.

Subsidiaries:

I.T.O. Corporation of Baltimore
I.T.O. Corporation of New England
I.T.O. Corporation of Ameriport
I.T.O. Great Lakes Corporation
I.T.O. Terminal Co. of Ameriport, Inc.
I.T.O. Warehouse Co., Inc. of Port Newark
I.T.O. Corporation of New England
I.T.O. Corporation of Rhode Island
International Terminal Operating Co. of La., Inc.
Southern Stevedoring Corp.
Tidewater Stevedoring Corp.
Burnside Agency, Inc.

John W. McGrath Corp.

Parent corporation: McGrath Services, Inc.

Subsidiaries:

Atlantic & Gulf Stevedores, Inc., Maryland
Atlantic & Gulf Stevedores, Inc., Virginia
Atlantic & Gulf Stevedores, Inc., Pennsylvania
Atlantic & Gulf Stevedores, Inc., Louisiana
Atlantic & Gulf Stevedores, Inc., Delaware
Atlantic & Gulf Equipment Corp.
Pacific, Atlantic & Gulf Stevedores, Inc., Oregon

Appendix C—Petitioners' Parent Corporations and Subsidiaries

Pittston Stevedoring Corp.

Parent corporation: None

Subsidiaries:

Pittston Warehouse Corp.
South Atlantic Terminals, Inc.
North Atlantic Terminals, Inc.

Universal Maritime Service Corp.

Parent corporation: J.G.C. Enterprises Corp.

Subsidiaries:

Versa Computer Services Corp.
36th Street Terminal Corporation
Universal Terminal & Stevedoring Corp. of California